RECENT DECISIONS.

ADMINISTRATIVE LAW.—MANDAMUS AGAINST GOVERNOR OF A STATE. The governor of a State was empowered by statute to appoint a lieutenant governor in case of a vacancy, but refused to make any such appointment. *Held*, that a writ of mandamus should issue against the governor, and, the attorney general not having acted, that a private citizen might be relator therein. *State ex rel. Trauger* v. *Nash* (Ohio, 1902) 64 N. E. 558.

There is great divergence in the decisions as to the right to issue mandamus against the governor of a State. The dictum of MARSHALL, C. J., in *Marbury* v. *Madison* (1803) 1 Cranch 137, at p. 170, that "it is not by the office of the person to whom the writ is directed, but by the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined," has given rise to the doctrine of the principal case that in the performance of ministerial acts a governor, equally with a subordinate officer, is subject to judicial control. *State* v. *Chase* (1856) 5 Ohio St. 528. The preponderance of authority however, is against the issuance of the writ, on the ground that the governor represents the executive branch of the government, and hence to make him subject to the judiciary in any case would be contrary to the principle of the distribution of governmental powers among independent departments. *People* v. *Governor* (1874) 29 Mich. 320; *People* v. *Morton* (1898) 156 N. Y. 136. The practice of allowing a private citizen to appear as relator in a matter concerning the public interest is in accordance with the prevailing rule. See High on Extraordinary Remedies, sec. 431.

BAILMENTS—PLEDGE—NECESSITY OF DELIVERY. To secure a note, the maker deposited with a bank warehouse-receipts for a quantity of whiskey. Thereafter, wishing to borrow further on the same goods, the debtor induced the bank to hold the warehouse-receipts for the benefit of a second lender, subject to the satisfaction of their own lien. *Held*, that the second lender acquired a lien which entitled him to preference over other creditors. *Hunt* v. *Bode* (Ohio, 1902) 64 N. E. 126.

The general rule is that without possession there is no lien. *Casey* v. *Cavarve* (1877) 96 U. S. 467. This is the doctrine of the civil law. Pothier, Pandectes, Vol. 7, p. 359; Book XX, Title I, Section III. More particularly is this requirement insisted upon where the rights of creditors are concerned. *Casey* v. *Cavarve*, *supra*, at p. 480. There need not, however, be actual physical possession. It may be symbolical as in the case of a bill of lading. *National Bank* v. *Kelly* (1874) 57 N. Y. 34. Or by an agent. *Sumner* v. *Hamlet* (1831) 12 Pick 76. It is not inconsistent with custody by the pledgor. *Jones* v. *Baldwin* (1832) 12 Pick 316; *Cooper* v. *Ray* (1868) 47 Ill. 53. Nor does a pledge to one prevent a sale to another, good as against creditors. *Whitaker* v. *Sumner* (1838) 20 Pick. 399. The question, then, is whether the first pledgee may hold as trustee or agent for the second lender. There is no difficulty as far as the rights of the pledgor are concerned, for he has consented to the interposition of a second lien. On the other hand third parties are not endangered, the possession not being in the pledgor. The result reached by the court accordingly seems correct.

CARRIERS—DUTY TO PROTECT PASSENGERS AGAINST THE CARRIER'S SERVANTS. The plaintiff, a passenger on the defendant's railway, was seized and taken from the train by the defendant's detective, the conductor refusing to interfere. *Held*, the defendant was liable, irrespective of whether the detective acted within the scope of his employment. *McLeod* v. *N. Y., Chi., & St. L. Ry. Co.* (1902) 72 App. Div. 116. See NOTES, p. 488.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—POWER OF LEGISLATURE TO MAKE EVIDENCE CONCLUSIVE. The legislature of Kansas passed a statute making the specification of weights in bills of lading issued by railroad companies conclusive evidence of the correctness of such weights. *Held*, in an action against a carrier to recover for a shortage, that the provision was unconstitutional as denying to the companies due process of law and invading the judicial province. *Missouri, K. & T. Ry. Co.* v. *Simonson* (Kan. 1902) 68 Pac. 653. See NOTES, p. 493.

CONSTITUTIONAL LAW—IMPAIRMENT OF CONTRACTS—POWERS OF MUNICIPALITIES TO REGULATE STREET RAILWAY RATES—EQUITY. Where municipal ordinances ordered reduction in street railway fares and the granting of free transfers, and disobedience of these ordinances by the plaintiff company, which denied their validity, was likely to cause serious disturbances and numerous suits against the company, and enforcement of the regulations would impair the company's earning power and interfere with its efforts to secure a necessary loan, it was *held*, that the court would take equitable jurisdiction in order to determine the validity of the ordinances, provided the defendants had not objected. And where a company had built under a statute authorizing construction "under such regulations and upon such terms and conditions as said authorities may from time to time prescribe," provided the permission of the municipality has been obtained and an agreement made as to rates, it was *held*, that such agreement as to rates is a contract, which subsequent municipal ordinances cannot impair. *Detroit* v. *Detroit Citizens' Street Ry. Co.* (1902) 184 U. S. 368. See NOTES, p. 487.

CONSTITUTIONAL LAW—TAXATION—PUBLIC PURPOSE. The city of Minneapolis, with legislative authority, granted public land without consideration, to the Minneapolis Industrial Exposition, a private corporation. *Held*, although involving taxation, the grant was legal because of the public interest. *City of Minneapolis* v. *Janney* (Minn. 1902) 90 N. W. 312.

The power of the courts to pass on the legality of the purpose of taxation has been denied. SELDEN, J., in *Wynehamer* v. *People* (1856) 13 N.Y. 430; CLIFFORD, J., dissenting in *Loan Ass'n.* v. *Topeka* (1874) 20 Wall. 655. It seems now, however, to be well-established. *Loan Ass'n.* v. *Topeka, supra*; Cooley, Const. Law, 2nd. ed. 57. The principal case is a correct application of the doctrine. *Daggett* v. *Colgan* (1891) 92 Cal. 53. The test is the public interest which affects the object for which aid is sought. Assistance to grain elevators and railroads would be upheld. *Burlington* v. *Beasley* (1876) 94 U. S. 310; *Perry* v. *Keene* (1876) 56 N. H. 514. Aid to bridge manufacturers and similar enterprises is illegal. *Loan Ass'n* v. *Topeka, supra*. Owing to the difficulty of measuring the interest of the public, much conflict exists.

CONTRACTS—AGREEMENT FOR REORGANIZATION OF RAILROAD—CONVERSION. Title to bonds of a bankrupt railroad was conveyed to a committee "for the purposes of this agreement." Very broad powers were given the committee, the only reservation in favor of the bond-owners being that they should have thirty days after the submission of a plan of reorganization in which to disapprove of such plan and regain title to their bonds. The committee purchased the railroad at a bankrupt sale, using the bonds therefor, which were cancelled to the amount of the purchase price. *Held*,

this was not a conversion, though the failure to submit a reorganization plan might be a breach of contract. *Industrial and General Trust* v. *Tod* (1902) 170 N. Y. 233.

The question was largely one of construction. WERNER, J., in an able dissenting opinion, believed the submission of a plan under the agreement a condition precedent to the exercise of all other powers given the committee. If so there certainly was an exercise of dominion in derogation of the owner's rights, and consequently a conversion. But the authority quoted for this construction seems inadequate. In *United Waterworks Co.* v. *Omaha Water Co.* (1900) 164 N. Y. 41, the submission of a plan was made an express condition precedent; in *Cox* v. *Stokes* (1898) 156 N. Y. 491, there was an unauthorized modification by the committee of an express term of the agreement.

CONTRACTS—BOND OF INDEMNITY. A contractor gave a city his bond for $10,000 as security for his paying any judgment obtained in a suit brought against both for injuries sustained through negligence in the performance of the contract work. By the terms of his original contract, the contractor was to indemnify the city for all such suits. Plaintiff in a suit secured a judgment for $22,000. An appeal was taken, but the city settled the suit against the contractor's protest. *Held*, that the city could recover on the bond. *City of New York* v. *Baird* (1902) 74 App. Div. 238.

The older cases regarded the obligation of a bond of indemnity against judgments as very strict. It was even doubted whether notice to the indemnitor was necessary, *Duffield* v. *Scott* (1789) 3 T. R. 374, or whether he could attack a judgment by default. *Lee* v. *Clark* (1811) 1 Hill, 56. But according to the later cases a judgment by default is not conclusive, *Conner* v. *Reeves* (1886) 103 N. Y., 527, and the indemnitor must be allowed an opportunity to interpose defences in the action. *Wheeler* v. *Sweet* (1893) 137 N. Y. 435. To give the indemnitor a right of appeal when he was a party to the action would be only a just application of this principle. The decision of the majority of the court therefore seems unnecessarily strict in requiring such right to be expressly stipulated, especially as the city had ample protection under the terms of its original contract.

CORPORATIONS—BANKS—LIABILITY OF INDIVIDUAL DIRECTOR TO CREDITORS. A bank director had learned by investigation that the bank was hopelessly insolvent, but took no steps to proclaim the fact and acquiesced in an arrangement by which deposits continued to be received. *Held*, that he was liable for the amount of such deposits. *Cassidy* v. *Uhlmann* (1902) 170 N. Y. 505.

It is well settled that a bank which, though hopelessly insolvent, keeps open and receives further deposits, is liable therefor on the ground of fraud. *Cragin* v. *Hadley* (1885) 99 N. Y., 131; *St. Louis & S. F. Ry. Co.* v. *Johnston* (1890) 133 U. S. 566. And under similar circumstances the board of directors have been held liable, *Seale* v. *Baker* (1888) 70 Tex. 283, even when they were actually ignorant of the bank's condition. *Delano* v. *Case* (1887) 121 Ill. 247. The latter case goes further than some courts are willing. *Minton* v. *Stahlman* (1896) 96 Tenn. 98. The extension of this rule that silence as to the insolvency is a fraud on subsequent depositors to the case of an individual director seems logical, as the insolvency creates a fiduciary relation between directors and creditors. *Haywood* v. *Lumber Co.* (1885) 64 Wis. 639, and therefore imposes on the former a special duty of good faith. The precise extent of this duty is a question of fact, but its existence makes it clear that absolute inaction is *prima facie* fraud. The fact that the director's motive here was not malicious is plainly immaterial.

CORPORATIONS—BUILDING AND LOAN ASSOCIATIONS—STATUS OF MEMBERS. The claimant was a borrower from a building and loan asso-

ciation, and pledged his stock as security for the debt. The association became insolvent, and the receiver was proceeding to collect all debts. The claimant contended that he should be credited with all payments of interest, dues, and premiums and that he was liable only for the balance with six per cent. interest. *Held*, the claimant occupied the dual position of stockholder and debtor and was liable for the amount borrowed with six per cent. interest less the amount of the premium and interest already paid by him, and he should share in the dividend or assessment declared on the stock which he pledged. *Coltrane et al.* v. *Blake et al.* (C. C. A., 4th Circ., 1902) 113 Fed. 785.

This decision makes a building and loan association the same as any other corporation, which seems to be the logical and most simple conclusion. See *Strohen* v. *Franklin Savings & Loan Ass'n* (1886) 115 Pa. St. 273. But some jurisdictions hold that the winding up of the association alters the borrower's contract, and in case the association becomes insolvent, all payments of dues, interest and premiums should be credited to his debt. *Waverly Mutual Ass'n.* v. *Buck* (1885), 64 Md. 338; *Bruist* v. *Bryan* (1894) 44 S. C. 121; *Cook* v. *Kent* (1870), 105 Mass. 246.

CORPORATIONS—REMOVAL OF CAUSES—EFFECT OF STATUTE. A South Carolina statute provided that when any corporation created in another State should file its charter with the secretary of state of South Carolina and comply with certain other requirements, it should become for all purposes a domestic corporation. The defendant corporation, which was created by the laws of Virginia and had complied with the requirements of the South Carolina statute, maintained, when sued in South Carolina, that it was a resident of Virginia for the purposes of federal jurisdiction. *Held*, the corporation did not become a citizen of South Carolina for the purposes of jurisdiction; to so hold would result in conflicting presumptions, because there is a conclusive presumption that the stockholders of a corporation are citizens of the State where the corporation was created. *Calvert v. Southern Ry. Co.* (S. Car. 1902) 41 S. E. 963.

Although this decision is in accordance with *St. Louis & S.F.Ry.*v. *James* (1895) 161 U.S. 545, it seems to beg the question involved. It is a question of legislative intent whether a statute creates a new corporation or permits a foreign corporation to carry on its business within the State; *Goodlet v. L. & N. R. R.* (1886) 122 U. S. 391; *Memphis & Charleston R. R. Co.* v. *Alabama* (1882) 107 U. S. 581; and the language of the South Carolina statute here under discussion would seem to leave very little doubt of the legislative intent. If the statute creates a new corporation there is no conflict of presumptions, for the stockholders are presumed to be residents of South Carolina. The rule as to presumption of citizenship laid down in *Marshall* v. *Railrord Co.* (1853) 16 How. 314., 328 is a fiction adopted to help the court out of an impossible position and should not be extended. See also "Corporations at Home and Abroad," 2 COLUMBIA LAW REVIEW 351.

DAMAGES—CONTRACT OF SERVICE—BURDEN OF PROOF. In an action based on a wrongful discharge of the plaintiff from the defendant's employ, where neither side presented evidence as to whether the plaintiff, after his discharge, had sought other employment, it was *held*, that a verdict for the full salary for the unexpired portion of the term of employment was excessive. *Moore* v. *Central Foundry Co.* (N. J. 1902) 52 At. 292.

The general rule is the other way, viz.: that the burden of proof is on the employer to show that the plaintiff did not seek other employment in an effort to minimize the damages. *Crawford* v. *Pub. Co.* (1897) 22 App. Div. 54; *Mathesius* v. *R. R.* (1899) 96 Fed. 792; *School Directors* v. *Orr* (1899) 88 Ill. App. 648. The complaint need not allege efforts to seek other employment. *Merrill* v. *Blanchard* (1896) 7 App. Div. 167; 158 N. Y. 682. But on the other hand, the defendant can bring out by cross-examining the plaintiff, the latter's failure so to act. *Ruland* v. *Water Co.*

(1900) 52 App. Div. 280; *Tel. Co.* v. *Bross* (Tex. Civ. App. 1898) 455. S.W. 178. And it has been held that, where the defendant shows that the plaintiff had obtained such other employment, the rate of compensation therefor will be presumed to be the same as that which obtained in the former situation. *Schroeder* v. *Trading Co.* (1899) 95 Fed. 296. The court in the principal case, therefore, has good excuse for the error into which it seems to have fallen.

EQUITY—RESTRAINT OF TRADE LIBEL. The defendant, the proprietor of a magazine, on several occasions published hostile criticisms of a rifle made by the plaintiff. The criticisms were maliciously written by the defendant himself, in revenge for the plaintiff's refusal to advertise. The plaintiff had no remedy at law because he could prove no special damage. *Held*, a court of equity could not grant an injunction. *Marlin Firearms Co.* v. *Shields* (1902) 171 N. Y. 384, reversing 68 App. Div. 88.

The case follows *Brandreth* v. *Lance* (1839) 8 Paige, 24, and the long-established doctrine that equity will not restrain a libel. See 2 COLUMBIA LAW REVIEW, 175, where the decision of the lower court was adversely criticised.

EQUITY—RIGHT OF PRIVACY—PUBLICATION OF PHOTOGRAPH AS AN ADVERTISEMENT. The plaintiff's complaint alleged that the defendants, without permission, had used the plaintiff's likeness as an advertisement, and had posted 25,000 copies of it in various stores, warehouses and saloons throughout the country, and particularly in the neighborhood of her residence, causing her great humiliation, and ultimately nervous illness. *Held*, on demurrer, no cause of action was stated in law or in equity. *Roberson* v. *Rochester Folding Box Co.* (1903) 171 N. Y. 538. See NOTES, p. 486.

EQUITY.—TRUSTS. As trustee for A, the testator received a sum of money, of which no accounting was made for twenty years. He died insolvent. *Held*, there is no presumption that any part of his estate constitutes the trust fund, nor can any charge be laid upon the estate by the *cestui*. *Matter of Hicks* (1902) 170 N. Y. 195.

WERNER, J., who dissented, relied on *In re Hallett's Estate* (1881) 13 Ch. D. 696. But in *Ellicott* v. *Kuhl* (1901) 60 N. J. Eq. 333, which is in accord with the principal case, it is pointed out that in the English case the trust *res* was traced as far as the trustee's bank account; and that in order to lay a charge in favor of the *cestui*, the *res* must be traced to some particular part of the trustee's estate. All the cases cited by WERNER, J., are of this kind, save *Matter of Holmes* (1899) 37 App. Div. 15; 159 N. Y. 532, which is *contra* to the principal case, no distinction being possible on the ground that there the trustee paid interest on the *res* to the *cestui*. *State* v. *Banks* (Neb. 1901) 85 N. W. 43, is also *contra* to the principal case. *In re Mulligan* (D. C., D. of Mass., 1902) 116 Fed., 715, is in accord with it.

EQUITY—TRUSTS—DEPOSIT OF TRUST FUNDS IN BANK. Money was deposited by appellant "as executor." After failure of the bank he sought in this action to be declared a preferred creditor and awarded payment in full. *Held*, the deposit was special and appellant could secure complete repayment. *Officer* v. *Officer* (Ia. 1902) 90 N. W. 826.

The court argues that, since a trustee must, at the risk of being held personally liable, deposit the funds in his official capacity, the bank cannot receive the money as a general deposit; *i. e.*, since the trustee has no right to make himself a debtor to the *cestui*, the bank cannot have that right. The conclusion reached is manifestly erroneous. Nothing seems better settled than the power of a trustee to deposit trust funds in a bank as "trustee." It is because such deposits are general and the estate must

come in with other creditors of the bank that attempts have been made to hold the trustee, as in *Estate of Law* (1891) 144 Pa. St. 499. The rule of *Officer* v. *Officer* involves results so contrary to every-day business usage that, even were it supportable upon theory, it would seem most unwise as a matter of practice.

EVIDENCE—HEARSAY—PEDIGREE. In a suit by an administrator to recover from the defendant money deposited by his intestate in the names of "son Thomas" and "son John," the plaintiff sought to show that the intestate never had any children. *Held*, declarations by the deceased were admissible to show this fact. *Washington* v. *Bank for Savings* (1902) 171 N. Y. 166.

See 2 COLUMBIA LAW REVIEW, 170, where the decision of the lower court to the same effect is commented upon. The position is there taken that while the extension of the hearsay rule in pedigree cases to include evidence that no issue was ever born is sound, in this case the evidence was inadmissible because pedigree was not the primary question.

EVIDENCE—PUBLIC RECORDS—PARISH REGISTER. *Held*, that the parish register of a Roman Catholic church in Ireland is competent evidence to prove the date of a birth. *Hancock* v. *Supreme Council Catholic Benevolent Legion* (N. J. 1902) 52 Atl. 301.

"The principle on which entries in a register are admitted * * * depends on the public duty of the person making the entry." *France* v. *Andrews* (1850) 15 Q. B. at p. 759. In England under the common law therefore, only those registers required by law to be kept were recognized, others being treated as mere private memoranda. So the register of a Roman Catholic church was not allowed in evidence. *D'Aglie* v. *Fryer* (1844) 13 Law Journal N. S. Ch. 398. In this country some courts have observed the true basis of the English decisions, and held unofficial evidence inadmissible. *Kennedy* v. *Doyle* (1865) 10 Allen. 161; *Stoever* v. *Lessee of Whitman* (Penn. 1814) 6 Binn. 416. In the last case the evidence was admitted on the authority of a statute which explains the apparently anomalous decision in *Lewis* v. *Marshall* (1831) 5 Peters. 70, cited by the court in the principal case as an authority, for the register in *Lewis* v. *Marshall* was that of a parish in Pennsylvania. *Hunt* v. *Order of Chosen Friends* (1887) 64 Mich. 671, on the other hand supports the principal case.

INSURANCE—INSURABLE INTEREST—RIGHT TO PROCEEDS. At suit of a grantor's creditors a conveyance was declared to be voluntary, and a decree made, subjecting the property, if necessary after exhausting the grantor's property, to the payment of the creditors' judgment. Shortly afterwards, the grantee, being in possession, took out in her own name a fire insurance policy which was conditioned on the sole and unconditional ownership of the insured. *Held*, the condition was not broken. *Held* also, the creditors had no claim on the proceeds of the insurance. *Steinmeyer* v. *Steinmeyer* (S. Car. 1902) 42 S. E. 184.

A conveyance void as against creditors puts the title in the grantee subject only to the creditors' rights. But the existence of a lien or incumbrance is not a breach of the condition requiring sole ownership. *Carrigan* v. *Ins. Co.* (1881) 53 Vt. 418; *Dolliver* v. *Ins. Co.* (1880) 128 Mass. 315. The second point follows from the principle that an insurance policy is only a contract of personal indemnity, and not an incident to the property.

INTERNATIONAL LAW—INTERPRETATION OF TREATY—CONSULAR ADMINISTRATION OF ESTATE OF FOREIGN INTESTATE. The treaty between the United States and Italy provides that when a citizen of either country dies intestate in the other country, his consul may "intervene" in

the possession and administration of his estate. *Held*, the consul has the right to the general possession of the property, and not merely a right to be heard. *Matter of Lobrasciano* (1902) 38 N. Y. Misc. 415.

The decision is in harmony with the usual interpretation of international law. Hall, Int. Law, 330; *Matter of Vergil*, 4 Moore's Int. Arbitrations, 4390. The consuls of the United States are instructed to act in conformity with it. U. S. Rev. Stats. Sec. 1709. Words in treaties should be given their customary meaning. Hall, Int. Law, 350. And if doubtful, their broad and liberal meaning. *U. S.* v. *Percheman* (1833) 7 Pet. 51. And though the word "intervene" has a technical meaning in New York practice, State law must yield to federal treaties. U. S. Const. Art. 6, Sec. 3. *Matter of Logiorato* (1901) 34 N. Y. Misc. 31, however, is *contra*. See also *Lanfear* v. *Ritchie* (1854) 9 La. Ann. 96, and *Succession of Rabasse*. (1895) 47 La. Ann. 1452.

MUNICIPAL CORPORATIONS — HIGHWAYS — RIGHT OF ABUTTING OWNER. The plaintiff was the owner of property abutting on a street, the fee of which was in the city. The defendant with the consent of the city placed two poles supporting nine wires, each under an inch in diameter, in the street alongside plaintiff's property. *Held*, the plaintiff had been deprived of property by the act of the defendant and was entitled to a mandatory injunction for the removal of the poles. *Callen* v. *Columbus Edison Electric Light Co.* (Ohio, 1902) 64 N. E. 141. See NOTES, p. 492.

NEGOTIABLE INSTRUMENTS—BANKING—DUTY OF DEPOSITOR TO VERIFY ACCOUNT. Plaintiffs' clerk systematically altered for his own benefit their checks on defendant bank. The bank paid the checks and returned the vouchers to the plaintiffs, who intrusted them to the defaulting clerk for verification. *Held*, that plaintiffs as depositors owed the bank the duty of using reasonable care to verify the vouchers, and were responsible for the failure of the clerk to give notice of the frauds. *Critten* v. *Chemical National Bank* (1902), 171 N. Y., 219. See NOTES, p. 490.

PLEADING AND PRACTICE—EXAMINATION BEFORE TRIAL UNDER THE N. Y. CODE. The applicant was injured by a wagon bearing the name "Century Express." Since she was unable to ascertain who was the owner at the time of the injury, owing to the fact that there had been several reorganizations of the business under new names, an order was sought, under N. Y. Code Civ. Proc. §§ 872–876, to examine S., a former owner of the "Century Express" and now manager of the succeeding company. *Held*, such an order cannot be granted to determine against which of certain persons there is a right of action. *Matter of Schoeller* (1902), 74 App. Div. 347.

Examinations of this kind, which were "inquisitorial rather than probative," have been permitted. *In re Nolan* (1898) 70 Hun 536, and *In re Weil* (1898) 25 App. Div. 173. The order was denied here on the authority of *In re Anthony* (1899) 42 App. Div. 66, and others cases. A good cause of action was shown in the principal case and no "fishing expedition" was intended. Had the dissenting opinion prevailed a multiplicity of suits would have been prevented without a departure from the spirit of the code section. A decision by the Court of Appeals would clear the confusion existing in New York.

PLEADING AND PRACTICE—SETTING ASIDE VERDICT. Three verdicts had been returned for the plaintiff in an action to recover damages for the death of her intestate, two of which had been set aside as against the weight of evidence and the third on account of excessive damages. A fourth verdict was returned for the plaintiff on substantially the same evidence. *Held*, that the court would not interfere further. *McCann* v. *N. Y. and Q. C. Ry. Co.* (1902) 73 App. Div. 305.

Though courts will hesitate to set aside a second or third verdict as being against the weight of evidence, the question is one of judicial discretion and there is no fixed rule. In an English case, *Foster* v. *Steele* (1837) 3 Bing. N. C. 892, all the judges agreed that a third verdict should not be disturbed and this seems to be the settled practice in New York. *Dorwin* v. *Westbrook* (1896) 11 App. Div. 394; *Nutting* v. *Railroad Co.* (1897) 21 App. Div. 73. Some courts, however, tend to exercise more freedom in passing on the sufficiency of evidence. *Burnham* v. *N. Y. P. & B. R. R. Co.* (1894) 18 R. I. 494; *Spinks* v. *Athens Savings Bank* (1899) 108 Ga. 376.

REAL PROPERTY—DOWER—PURCHASE MONEY MORTGAGE. A husband bought land and assumed a mortgage thereon. Upon receiving a deed he gave a new mortgage to the holder of the original mortgage, which was thereupon cancelled. All transactions were done at one time. *Held*, dower was barred as against the mortgage lien, the husband never having been fully seised. *Groce* v. *Ponder* (S. Car. 1902) 41 S. E. 83.

This decision does not go beyond the extreme cases wherein purchase-money mortgages have been given precedence over dower rights. They are universally sustained when given to the vendor. Also, as a general rule, when given to a party furnishing the purchaser with the money. *Carey* v. *Boyle* (1881) 53 Wis. 581. There is more conflict of authority in the case of mortgages given to creditors of the vendor. In *McClure* v. *Harris* (1851) 51 Ky. 261, dower was held superior to such a mortgage, while *Butler* v. *Thornburgh* (1895) 141 Ind. 152, and *Coffman* v. *Coffman* (1884) 79 Va. 504, laid down the same doctrine as the principal case. The latter may be termed the more modern view. Whatever encumbrance is placed upon the property, simultaneous with its acquisition, as a part of the consideration, may well be protected, in view of these decisions, as a purchase-money mortgage.

REAL PROPERTY—LANDLORD AND TENANT—LANDLORD'S LIABILITY FOR NUISANCE OF TENANT. The plaintiff, lawfully on the street, fell upon ice on the sidewalk in front of premises which the defendant had let to a tenant without retaining any control. The water which had frozen came from a ditch placed on the land by the defendant before the letting. *Held*, the defendant was not liable. *Gardner* v. *Rhodes* (Ga. 1902) 41 S. E., 63.

The Court absolves the landlord on the ground that the nuisance did not lie in the construction of the ditch. A landlord is liable when the condition of the premises is such that use of them will necessarily result in a nuisance. Wood, Nuis. (2d ed.), 76–77. In England if it is possible to use the premises so as not to produce a nuisance, for any other user by the tenant the landlord is not liable. *Rich* v. *Basterfield* (1847) 4 C. B. 805. (Brown *v.* Bushell, 1867, L. R. 3 Q. B. 251, is distinguishable, as the landlord retained control over the drain.) Other courts take the position that, if at the time of letting user resulting in a nuisance would reasonably be expected, the lessor is liable. *Prussak* v. *Hutton* (1898) 30 App. Div. 66; *Fish* v. *Dodge* (1847) 4 Den. 811.

REAL PROPERTY—LICENSE—TRANSFER OF THEATRE TICKETS. The plaintiff, a licensed speculator in theatre tickets, sought to restrain the defendants, proprietors of a theatre, from interfering with him in his sidewalk sale of tickets to their performances. *Held*, theatre tickets are merely revocable personal licenses, and plaintiff was not entitled against the licensor to protection in his traffic therein. *Collister* v. *Hayman* (1902) 71 App. Div. 316.

The nature of such tickets does not seem to have been decided by the court of last resort in New York. In *People ex rel Tyroler* v. *Warden. etc.* (1898), 157 N. Y. 116, the Court of Appeals held a statute restricting traffic in railroad tickets unconstitutional. The decision did not involve

the rights of the party issuing the ticket to revoke the privileges granted. But even had it upheld property rights in such tickets a different result in regard to those issued by a theatre would not be inconsistent, as the legal liabilities of a railroad to the public are vastly greater than are those of a place of amusement. The decision is supported by the great weight of authority.

REAL PROPERTY—SURFACE WATER—DISCHARGE UPON HIGHWAY. The defendant constructed a drain pipe leading from the roof of his house to the street, but omitted to construct the proper race-way to carry off the water; whereby the water, collecting upon the sidewalk, froze, and the plaintiff was injured. *Held*, the defendant was liable. *Tremblay* v. *Harmony Mills* (1902) 171 N. Y. 598.

It being clear, in jurisdictions not adopting the civil law right of drainage, that to change the course of surface-water after it enters one's close is a nuisance, 2 COLUMBIA LAW REVIEW, 143, the real question here is whether drainage into a public highway, if the abutting owner is seized of the fee of the highway, is incompatible with the public rights of user. In *Jessup* v. *Bramford Bros. Co.* (1901) 66 N. J. L. 641, all the judges considered the question solely as though it were an issue between adjoining landowners. On its actual facts that case is contrary to the one under consideration. In this case dissenting judges feel bound by prior decisions. While the remarks in *Wenzlick* v. *McCotter* (1881) 87 N. Y. 122 are only dicta, the only distinction that can be made between the present case and *Moore* v. *Gadsden* (1883) 93 N. Y. 12, is that there was negligence in the omission of any race-way. *Kirby* v. *Market Ass'n.* (1859) 14 Gray, 249, is in accord with the principal case.

STATUTES—ANTI-TRUST ACT—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE. The defendants and certain other dealers in tiles and mantel fixtures in San Francisco formed an association with all the American manufacturers of such articles, by which the manufacturers were to sell tile to non-members within 200 miles of San Francisco at a prohibitive price. The qualifications for membership were that a stock of a certain amount should be carried and that the applicant should be acceptable to the other members and should pay an initiation fee. *Held*, the association was an attempt to monopolize a branch of interstate commerce, and even if every applicant complying with the conditions would be admitted, the association could not impose such conditions for engaging in interstate commerce. *Montague & Co. et al.* v. *Lowry et al.* (C. C. A. 9th Circ. 1902) 115 Fed. 27.

The only question under the Sherman anti-trust law is whether the necessary effect of the combination is to restrain interstate commerce; *Chesapeake & O. Fuel Co.* v. *United States* (C. C. A. 6th Circ. 1902) 115 Fed. 610. The contract here was a direct attempt to monopolize a branch of interstate commerce and comes within the statute. *United States* v. *Addprton Pipe & Steel Co.* (1898) 85 Fed. 271. It is not necessary that the result of the combination be a complete monopoly throughout a State or the Union, if its direct result is to restrain interstate commerce. *U. S.* v. *E. C. Knight* (1894) 156 U. S. 1.

STATUTES—INTERSECTING RAILROADS. The N. Y. Railroad Law of 1880, c. 565, gives to every railroad corporation the right to unite its line with that of any other railroad, the two to join in making the connection, and each to receive and forward goods from the other. *Held*, this statute applied to the junction of a steam with an electric street railroad which had the right to transport both passengers and freight. *Stillwater, etc. Street Ry. Co.* v. *Boston & Maine R. Co.* (1902) 171 N. Y. 589.

The point seems to be new. Most States have similar statutes. The Illinois statute has been held to apply to the case of two horse railroads. *Chicago* v. *Evans* (1860) 24 Ill. 52.